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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91178539
Party	Plaintiff SmithKline Beecham Corporation
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SMITHKLINE BEECHAM CORPORATION

Opposer,

v.

OMNISOURCE DDS, LLC

Applicant.

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Opposition No. 91/178,539

OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO STRIKE TESTIMONY

Opposer, SmithKline Beecham Corporation, respectfully submits this brief in opposition to Applicant's motion to strike testimony.

BACKGROUND

Applicant objected to the evidence which was attached as "Exhibit A" to Opposer's Second, Third, and Fourth Notices of Reliance. In each case, Opposer submitted a list of articles from the NEXIS database that mention Opposer's AQUAFRESH mark. These lists are relevant to this opposition, because, among other things, they demonstrate that Opposer's mark has appeared in a large number of articles published in a wide range of publications. Opposer's Second and Fourth Notices of Reliance contain lists of articles in the NEXIS database that mentioned AQUAFRESH in the month preceding Applicant's filing date and in the three years since then. Opposer's Third Notice of Reliance contains a list of articles published during the month of January in each year from 1995 through the present that mention Opposer's mark. These documents indicate that public exposure to Opposer's AQUAFRESH mark was widespread prior to the filing date of Applicant's application, and that Opposer's mark would have been familiar and well known to readers of those publications.

In addition to these lists of articles, Opposer submitted a sampling of actual articles from each list that mention AQUAFRESH.¹ In order to avoid overburdening the Board, Opposer did not submit all of

¹ These full-text articles were attached as "Exhibit B" to Opposer's Second, Third, and Fourth Notices of Reliance. Applicant has not moved to strike any of this evidence.

the articles which were cited on each list, although Opposer could provide these materials if the Board requires them.

ARGUMENT

Applicant claims that these lists of articles should be excluded, because Applicant has no way of knowing whether these articles discuss Opposer, Opposer's marks, or the goods at issue in this proceeding. Although Opposer did not submit a full text copy of each article, the lists contain a brief excerpt from each article with the word "AQUAFRESH" highlighted in bold text. These brief excerpts confirm that all of the articles mentioned on these lists relate to Opposer, its AQUAFRESH marks, and/or the oral care products Opposer offers under those marks. Opposer also submitted the search strategy used to retrieve these lists from the NEXIS database, it identified the relevant database library where the search was conducted, and it identified the date restrictions which were used to narrow each search. Thus, if Applicant wanted to obtain full text copies of the articles mentioned on any of these lists it would be able to replicate these searches on its own.

Applicant claims that it has no way of knowing whether these articles were published in the United States or abroad. Opposer's Fourth Notice of Reliance specifically states that Opposer only submitted a list of articles from the "US Newspapers" category in the NEXIS database. By contrast, Opposer's Second and Third Notices of Reliance contain lists of articles from the "Major Papers" and "All News" libraries, but each list contains the titles of the publications where these articles were published. Thus, Applicant should be able to determine whether an article was published in a foreign publication, such as the *New York Times* or a foreign publication such as the *Times of India*.

Applicant claims that the articles cited on these lists may not be in general circulation or they may not be generally available to the public. All of these lists were generated from the NEXIS database. By definition, any article within that database is in general circulation and accessible to the general public.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board deny Applicant's motion to strike Exhibit A to Opposer's Second, Third, and Fourth Notices of Reliance.

Dated: March 27, 2009

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of Opposer's Brief in Opposition to Applicant's Motion to Strike has been duly served by mailing such copy first class, postage prepaid, to Erik M. Pelton, P.O. Box 100637, Arlington, VA 22210 on March 27, 2009.



Erik Bertin